

THE LAWS ARE NOT TO BLAME?

A Commentary on The Non Performance of State Owned Enterprises In Ghana

9-minute read

“SIGA is a new institution, and my expectation is that you would help develop a new culture... the attitude must be new king, new law; a new authority, a new culture; a culture of accountable governance and of respecting the norms; sensibilities and practice of good corporate governance.”

These were the words of the President of the Republic of Ghana during the launch of the State Interests and Governance Authority (SIGA). SIGA is the new authority established pursuant to the State Interests and Governance Authority, Act 2019 (Act 990) (“the SIGA Law”) to ensure that companies and other entities in which the government hold shares are efficiently run and adhere to good corporate governance and ultimately make profit.

Typically, state-owned enterprises are established for the following reasons:

- Addressing market failures by providing public goods and funding for key infrastructure projects.¹
- Supporting vulnerable social groups by protecting jobs in so called sunset industries.²
- Ensuring stability and affordability of public utility prices.³
- Promoting industrialization, particularly by launching new industries with significant start-up costs and long-term investments.⁴
- Limiting non-state ownership in specific industries such as the arms and network industries (for national security reasons).⁵
- Serving as vehicles of innovation, knowledge dissemination, and technological spin-offs.⁶

1 Vickers, John, and George Yarrow. 1991. “Economic Perspectives on Privatization.” *Journal of Economic Perspectives*, 5 (2): 111-132.

2 H. Christiansen Balancing Commercial and Non-commercial Priorities of State-Owned Enterprises. OECD Corporate Governance Working Papers no.6 OECD Publishing, Paris (2013)

3 P. Matuszak, B. Kabaciński Non-commercial goals and financial performance of state-owned enterprises – some evidence from the electricity sector in the EU countries J. *Comparative Econ.* (2021), 10.1016/j.jce.2021.03.002

4 A. Musacchio, S.G. Lazzarini Reinventing State Capitalism: Leviathan in Business, Brazil and beyond (first ed.), Harvard University Press (2014)

D. Robinett Held by the Visible Hand: the Challenge of State-Owned Enterprise Corporate Governance for Emerging Markets World Bank, Washington, DC (2006)

6 P. Castelnovo, M. Florio Mission-oriented public organizations for knowledge creation L. Bernier, M. Florio, P. Bance (Eds.), *The Routledge Handbook of State-Owned Enterprises*, Routledge, London & New York (2020)

Entities With State Interest

In many of the world's major economies, state owned enterprises play an important role⁷ and the case in Ghana has been no different.

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After Ghana attained independence, the government realized the need to develop the economy in certain major areas. The government felt that some services were so fundamental that the companies which provided them had to be controlled by the State and not left completely in private hands.⁸

Successive governments have therefore owned or held stakes in businesses operating in key sectors of the economy such as agriculture, agro processing, mining, commodity trading, manufacturing, utility service provision and hospitality. This deliberate policy led to the establishment of a myriad of entities with varying levels of government ownership and control.

Under the SIGA Law, businesses which are owned in whole or part by the government are classified under four main groups. They are either State Owned Enterprises, Joint Venture Companies or Other State Entities.

State Owned Enterprises (SOEs) are entities whose shares are wholly held or controlled by the Government of Ghana. They are usually entities set up for commercial purposes and may take the form of special purpose vehicles like ESLA Plc. and Ghana Amalgamated Trust (GAT).⁹

The last published State Ownership Report by SIGA¹⁰ stated that there are a total of 132 SOEs in Ghana.

Joint Venture Companies (JVCs) are business arrangements in which different persons or entities contribute capital, labour, assets, skill, experience, knowledge, or other resources useful for the business and share the profits and risks associated. Under Ghana's State Ownership law, JVCs are those entities in which the Government holds majority or minority shares.

Other State Entities (OSEs) are entities which though not wholly or partly owned by the State, are nevertheless brought under the purview of the SIGA. The Minister of Finance, with supervisory authority over the SIGA, has the power to declare an entity as a Specified Entity thus

⁷ Maciej Bałtowski, Grzegorz Kwiatkowski, *State-Owned Enterprises in the Global Economy* June 2, 2022 by Routledge

⁸ Mr. K. Addai-Mensah, Member of Parliament for Bantama during the Second Reading of the State Enterprises Commission Bill May 22, 1981

⁹ State Ownership Report 2020 – Ministry of Finance of the Republic of Ghana

¹⁰ State Ownership Report 2020 – Ministry of Finance of the Republic of Ghana

bringing it under SIGA's ambit. Examples of Other State Entities are regulatory bodies and statutory agencies.

This article is an enquiry into the issues that underlie the poor performance of a significant number of entities with state interest and provides a commentary on whether the challenges are attributable to the legal regimes that have governed state owned enterprises.

Down Memory Lane

State Enterprise Secretariat (SES-1965)

The SES-1965 was first set up by the State Enterprise Secretariat (SES), 1965 Legislative Instrument (L.I. 47) with the objective of ensuring the efficient running of state enterprises and was directly responsible to the President. The SES had four main divisions

- i. Planning and Statistics Division
- ii. Accounts and Audit Division
- iii. Inspectorate Division
- iv. Personnel and Training Division

A look at the structure of the SES-1965 reveals that it was set up mainly to supervise and check the operations and financials of the fifteen (15) manufacturing enterprises and six (6) mixed enterprises that were under its jurisdiction.¹¹ The SES-1965 was short-lived as a result of the 1966 coup but it failed in its short lifespan to achieve its mandate because it did not wield the power to ensure that its efficiency measures were implemented.

Some scholars have attributed the SES-1965's failure at the time, to the blurring of the responsibilities of the President, Ministers and the SES-1965 itself.¹²

State Enterprises Commission (SEC-1976)

The SEC-1976 was established by the Supreme Military Council Decree, 1976 (SMCD 10). This was a commission of a maximum of five members and headed by a chairman. The chairman was supposed to be a Ghanaian of distinction with a minimum of ten years practical experience in an executive position in business or administration.

It is interesting to note that to qualify for the chairmanship of SEC-1976, one had to be at least forty years of age. The rather interesting provision restricting the age of the chairperson may be

¹¹ Public Corporations in Ghana (Gold Coast) during the Nkrumah Period – Dr. Dennis K Greenstreet

¹² Public Corporations in Ghana (Gold Coast) during the Nkrumah Period – Dr. Dennis K Greenstreet

attributed to the tensions that existed at the time between relatively junior officers in government and the senior commanders of the armed forces.¹³ The senior commanders of the armed forces who had just captured power from junior military officers perhaps wanted to keep the younger ranked officers in check by preventing them from holding influential positions.

Its members were to be appointed by the political administration at the time¹⁴ and the SEC-1976 as a corporate body was answerable to the Head of State. The SEC-1976 had both advisory and executive powers over the operations of all statutory corporations. It could recommend the revision of the objectives of any statutory corporation, perform a management audit of officers of statutory corporations, review operations, staff strength and conditions of service as well as recommend the closure or reclassification of any entity that was ill conceived or could not make profit.

During a parliamentary debate on May 27, 1981, the following reasons were given as to why the SEC-1976 was unable to live up to expectations.

- The range of functions and responsibilities assigned to SEC-1976 were too enormous for its size and capacity.
- It never had its full complement of members over the entire period of its existence.
- It did not have the staff strength and competence to effectively supervise and control the operations of the corporations.
- It had no say in the appointments of the chief executives and directors on the Board.
- There was an overlap in the mandate of some of the Ministries and the state owned enterprises resulting in unnecessary political interference. This was worsened by the fact that the Ministries themselves did not have the time or expertise to supervise or coordinate the corporations.
- Notwithstanding the challenges associated with Ministries, the corporations tended to gravitate towards their parent Ministries in dealing with their operational challenges rather than SEC-1976.
- The government did not provide the needed capital and financial support.

¹³ Singh, Naunihal (26 August 2014). *Seizing power : the strategic logic of military coups*. Baltimore, Maryland: Johns Hopkins University Press. pp. 89 & 139. ISBN 978-1421413365.

¹⁴ The Supreme Military Council

State Enterprises Commission (SEC-1981)

The SEC-1981 was established by the government of the Third Republic of Ghana after a period of military rule. The enactment of the State Enterprises Commission Act, 1981 (Act 433) replaced the State Enterprises Commission (SEC-1976). One of the key features of SEC-1981 was that it had no executive powers and its functions were mainly advisory.

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The State Enterprises Commission Act, 1981 (Act 433) separated the commercial corporations from non-commercial ones. The functions of the SEC-1981 were limited to the industries that were intended by the government to act as purely commercial entities and operate on commercial lines. This change was a reaction to the lack of capacity of the SEC-

1976 to adequately supervise all the covered entities.

State Enterprises Commission (SEC-1987)

This was set up by the State Enterprises Commission Law, 1987 (P.N.D.C.L. 170) which repealed the SEC-1981. It had thirteen objectives many of which were a repetition of the objectives of its predecessors. Some of the new objectives were the examination of investment proposals of the entities, ensuring the payment of appropriate dividends to government, recommending government guarantees, credit and financing, provision of consultancy services at an agreed fee to be paid into the Consolidated Fund and the possibility of engaging the services of a consultant where it requires such services.

Entities with state interest¹⁵ were required to submit annual reports and any documents required to the SEC-1987. PNDCL 170 proscribed any expansions or modifications without the approval of a feasibility report by the SEC-1987. The SEC-1987 was answerable to the President through the Minister. The SEC-1987 also had disciplinary powers in the form of recommending the dismissal, suspension or forfeiture of an officer who contravened the provisions of the State Enterprises Commission Law, 1987 (P.N.D.C.L. 170).

¹⁵ With the exemption of 79 entities stated in the Schedule to P.N.D.C.L. 170

State Interests and Governance Authority (SIGA)

SIGA was established by the enactment of the State Interests and Governance Authority (SIGA) Act 2019 (Act 990) after the findings of a joint Government of Ghana and World Bank study¹⁶ recommended that the management of SOEs be streamlined and centralized under the Government's oversight to strengthen corporate governance, transparency and accountability.

Under Act 990, SIGA has five objectives which are to:

- (a) Promote within the framework of Government policy, the efficient or where applicable profitable operations of specified entities;*
- (b) Ensure that specified entities adhere to good corporate governance practices;*
- (c) Acquire, receive, hold and administer or dispose of shares of the State in state-owned enterprises and joint venture companies;*
- (d) Oversee and administer the interests of the State in specified entities; and*
- (e) Ensure that;*
 - (i) State-owned enterprises and joint venture companies introduce effective measures that promote the socioeconomic growth of the country including, in particular, agriculture, industry and services in accordance with their core mandates; and*
 - (ii) Other State entities introduce measures for efficient regulation and higher standard of excellence.*

It however, has as many as thirteen functions as opposed to the two of its immediate predecessor. Notable among these functions are the development of a Code of Corporate Governance, assessing the borrowing levels of SOEs in accordance with the Public Financial Management Act¹⁷, advising government on the removal of chief executive officers and board members of SOEs, coordinating the sale and acquisition of entities with state interests, ensuring adherence to annual performance contracts signed by entities with state interest and advising the minister with oversight over the authority.

Having gone back in time to scan the legal regime governing entities with state interest, it is clear that most of the predecessors of SIGA had the power to punish or at least recommend the removal of officers who failed to perform their corporate governance duties.

The current law, Act 990 specifically in sections 4 (i) and (j), empower SIGA to

¹⁶ On the corporate governance framework of the various SOEs from the year 2013 to the year 2015.

¹⁷ Public Financial Management (PFM) Act, 2016 (Act 921)

- (i) Advise the sector Minister on policy matters for effective corporate governance of specified entities;
- (j) Advise Government on the appointment and removal of chief executive officers or members of the boards or other governing bodies of specified entities; and

These wide powers notwithstanding, SIGA in its latest State Ownership Report¹⁸, only lamented the failure of entities with state interest “to honour their reporting obligations”, and noted that it is “a flagrant violation of the Public Financial Management (PFM) Act, 2016 (Act 921)” and condemned the practice as “a most unfortunate development that needs to be remedied”.

The paradox of performance

From the foregoing, it can be concluded that the inability of entities with state interest to be efficient and profitable is not caused by a poor legal regime but rather by poor implementation of the legal regime. In fact it appears that the less interest the government has in a commercial venture, the more likely it is that the entity will be run efficiently and profitably.

In 2020, SOEs (wholly government owned) recorded an aggregate loss of GHS 2.61 billion while JVCs (with 10-50% government ownership) recorded an aggregate profit of GHS 11.81 million. Entities in which the government holds an interest of not more than 10%¹⁹ made an aggregate profit of GHS 11.25 billion.

Although these figures ought to be considered within the context of the impact of the COVID 19 pandemic, the trend is quite conspicuous. While the totality of SOEs made a loss during the year in review, SOEs with minority government interests made profit.

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SOEs and JVCs have been reporting net losses and net profits respectively for quite some time now. Net loss for SOEs in 2017 stood at GH¢1,289 million compared to net losses of GH¢2,115 million and GH¢30,144 million for 2016 and 2015 respectively. JVCs made net profits of GHS 711 million in 2016 and 800 million

in 2017.²⁰

Appointments of key personnel to SOEs are usually spoils of war to the lieutenants who fought alongside the king in the trenches during the election campaign. This practice which was identified as far back as the days of the State Enterprise Secretariat in 1965 must be changed or at

¹⁸ 2020 State Ownership Report

¹⁹ Mostly mining companies

²⁰ 2017 State Ownership Report

least balanced with a mechanism that compels the rewarded lieutenants to comply with the corporate governance principles enshrined in the law.

If these are not done, irrespective of the number of times the king changes the law, or the institution implementing the law, the words of Jean-Baptiste Alphonse Karr will still hold true.

“plus ça change, plus c'est la même chose” to wit; the more things change, the more they stay the same.

“Turbulent changes do not affect reality on a deeper level other than to cement the status quo. A change of heart must accompany experience before lasting change occurs.”

Michael Apalbilah B.Y is a lawyer at AB & David specializing in the areas of Government Business & Regulation, Dispute Resolution and Africa Trade.

Michael holds a DALF C1 certification from the Centre International D'Études Pédagogiques in France.